No. 95-17

FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1995

STEVEN C. SCHUELLER, M.D.,

Petitioner,

v.

ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. L.F. GARCIA; DR. J.D. RANKIN; Estate of DR. C.E. RIPLEY, BETTY RIPLEY, Personal Representative; DR. D.L. TOON; and DR. B.J. WALSH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

Steven C. Schueller, M.D.

Respondents:

Ashley Memorial Hospital[1]; Dr. T. Birriel; Dr. F.N. Burt; Dr. E.A. Gresham; Dr. L.F. Garcia; Dr. J.D. Rankin; Estate of Dr. C.E. Ripley, Betty Ripley, Personal Representative; Dr. D.L. Toon; and Dr. B.J. Walsh.

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[1] At the times relevant to this action, Ashley Memorial Hospital was owned by Crossett Health Foundation and managed by Health Quorum Resources, Inc.

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STATEMENT OF THE CASE

Petitioner, Dr. Steven C. Schueller (hereinafter "Dr. Schueller"), is a board certified general surgeon. He moved to Crossett, Arkansas, in 1983 where he was granted privileges to practice surgery at respondent Ashley Memorial Hospital (hereinafter "AMH"). AMH is the only hospital located in Crossett, Arkansas. AMH serves a circular geographic area within a 25-mile radius of Crossett.

The individual respondents are physicians who had staff privileges at AMH during part or all of the period that Dr. Schueller did. These respondents are Drs. Birriel, Burt, Gresham, Garcia, Rankin, Ripley (deceased), Toon, and Walsh. With the exception of Dr. Birriel, all of these physicians were engaged in "family practice," were not board certified surgeons and did not practice surgery. Dr. Birriel is a non-board certified general surgeon who was granted staff privileges at AMH in 1989.

During 1991, certain unprofessional conduct on the part of Dr. Schueller resulted in his privileges at AMH being suspended effective August 7, 1991. In later months, AMH instituted formal peer review proceedings to determine whether the suspension of Dr. Schueller's privileges should remain in effect and whether Dr. Schueller's privileges at AMH should be permanently revoked. Those proceedings included two hearings. One hearing, at which Dr. Schueller was present, occurred on September 20, 1991. The second hearing, attended by Dr. Schueller and counsel representing him, occurred on December 16, 1991. After the second hearing, the AMH Board of Governors voted to revoke Dr. Schueller's privileges.

On June 16, 1992, Dr. Schueller filed this action against AMH, the individual respondent physicians, and others, alleging that respondents' actions in revoking his privileges constituted a conspiracy to boycott him in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, as well as a collective refusal to deal and an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Dr. Schueller also claimed that AMH violated the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, by denying him due process in the course of the peer review proceedings.

After extensive discovery was conducted, respondents moved for summary judgment on all of Dr. Schueller's antitrust claims. Respondents also moved for summary judgment on the ground that they were entitled to immunity, as a matter of law, from damages in this antitrust action under the Health Care Quality Improvement Act and that Dr. Schueller did not have a private right of action for violation of that act.

The United States District Court for the Western District of Arkansas determined that respondents were entitled to immunity from damages under the Health Care Quality Improvement Act and that Dr. Schueller had no private right of action under the act. The district court went on to consider the merits of Dr. Schueller's antitrust claims due to the fact that both damages and injunctive relief had been sought by Dr. Schueller. The court granted summary judgment to respondents on all of Dr. Schueller's antitrust claims. Dr. Schueller appealed to the Eighth Circuit Court of Appeals all of the district court's rulings, with the exception of the ruling that no private right of action existed under the Health Care Quality Improvement

Act. The Eighth Circuit affirmed the district court's granting of summary judgment.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW FAIL TO COMPLY WITH THE RULES OF THE UNITED STATES SUPREME COURT.

Each of the three questions presented by petitioner, Dr. Steven C. Schueller, fails to comply with the Rules of the United States Supreme Court. Rule 14.1.(a) of this Court requires that the questions presented be expressed in "short and concise" terms. It is difficult to ascertain from a review of Dr. Schueller's questions presented the precise issues upon which he seeks review. The questions presented are lengthy, compound, and confusing. The argument of the petition does not clarify the issues, but only serves to cloud the issues further. Because of the lack of clarity of both the questions presented and the argument, it appears that Dr. Schueller may be raising arguments not properly before the Eighth Circuit Court of Appeals. On this basis alone, the Court should deny the petition. *See* Sup. Ct. R. 14.5.

II.

NO CONFLICT EXISTS BETWEEN THE DECISION OF THE LOWER COURT AND PRIOR DECISIONS OF THIS COURT AND THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEAL.

Dr. Schueller's statement of the first question presented for review by this Court is misleading in that it

implies that the district court's decision granting respondents' motion for summary judgment, and the Eighth Circuit's affirmance of that decision, are in conflict with the other decisions from this Court and the Eighth and Ninth Circuit Courts of Appeal. This is not so.

Presumably, Dr. Schueller contends that the Eighth Circuit, in applying the rule of reason analysis to his § 1 claim, focused on a product market theory that is inconsistent with prior decisions of this Court and other circuit courts of appeal. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457-59 (1986) (setting forth the rule of reason test applicable to § 1 claims); *see also Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 688 (8th Cir. 1993). Dr. Schueller misreads the basis for the lower court's decision. The Eighth Circuit affirmed the district court's granting of respondents' motion for summary judgment, *inter alia*, because Dr. Schueller failed to present sufficient evidence in opposition to the motion for summary judgment which would have established anti-competitive behavior on the part of respondents in the relevant market. *See* Pet. App. C, 5a. The evidence which Dr. Schueller presented was evidence of an alleged decrease in surgical referrals from the respondent physicians to Dr. Schueller. The Eighth Circuit held that evidence of a reduced number of surgical referrals to Dr. Schueller was not evidence of anti-competitive behavior. *Id.*

There is no conflict between the Eighth Circuit's reasoning and the cases cited by Dr. Schueller in the petition. In fact, both *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682 (8th Cir. 1993), and *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484 (9th Cir. 1991),

support the Eighth Circuit's reasoning in the present case. The courts in *Flegel* and *Morgan* recognized that there is no market for referral of medical services since referrals are not sold. Further, evidence of a decrease in referrals to a particular physician is not sufficient evidence to establish anti-competitive behavior resulting in injury to competition. *See Flegel*, 4 F.3d at 960; *Morgan*, 924 F.2d at 1485.

Dr. Schueller seems to contend that the district court and the Eighth Circuit erred in focusing on referrals as the product market when, in fact, he was contending that the relevant product market was either the market for surgical services or the market for medical services within the relevant geographic market. Regardless of what product market is focused upon, the reasoning of the lower courts remains sound. What evidence is there of anti-competitive behavior on the part of respondents that resulted in an injury to competition in any of the alleged product markets? Dr. Schueller pointed the lower courts to the decrease of referrals to him by the respondent physicians and the eventual termination of his privileges at the respondent hospital. Neither of these was sufficient evidence to overcome the motion for summary judgment. The Eighth Circuit has previously held that revocation of a physician's privileges alone does not give rise to an antitrust violation. *See Willman v. Heartland Hosp. East*, 34 F.3d 605, 610 (8th Cir. 1994). Evidence of injury to one competitor such as Dr. Schueller by revocation of privileges is not evidence of injury to competition. The antitrust laws seek to protect competition, not competitors. *See Flegel*, 4 F.3d at 690 (citing *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1234 (8th Cir. 1987)). The Eighth Circuit's decision

in the present case is consistent with this Court's pronouncement in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984), that "[w]ithout a showing of actual adverse effect on competition [a plaintiff] cannot make out a case under the antitrust laws . . . . "

Although Dr. Schueller contends in his statement of the case that there was evidence of a decrease in surgeries in the relevant market, his statement regarding the matter is misleading. The decrease in surgical cases reflected in Dr. Schueller's figures represents a decrease in his own surgical cases from which he extrapolates that there must have been a decrease in surgical cases in the overall market. Further, even assuming a decrease in surgical cases, Dr. Schueller failed to present sufficient evidence that any such decrease resulted from anti-competitive behavior on the part of respondents. As explained to the lower courts, the decrease in surgical cases, at least as to Dr. Schueller, was due to reasons such as Dr. Schueller's lack of personal hygiene, failure to have a nurse present for in-office exams of female patients, and the distaste in the community for public actions taken by Dr. Schueller.

The facts of the other Ninth Circuit decision cited by Dr. Schueller, *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), are so markedly different from the present case that it can hardly be said that the decision represents a conflict with the Eighth Circuit's decision in the present case. In *Oltz*, a nurse anesthetist sued several anesthesiologists and a hospital under § 1 of the Sherman Act. The hospital, as the result of pressure from the anesthesiologists, had agreed to terminate a billing services contract the nurse anesthetist had with the hospital.

An exclusive services contract was then awarded to the anesthesiologists. The services offered by the anesthesiologists were more costly than those provided by the nurse anesthetist, and, in some instances, were not preferable to the services provided by the nurse anesthetist. The jury found that this conduct constituted a violation of § 1 of the Sherman Act.

The anti-competitive behavior the *Oltz* court focused upon was intentional actions by one set of competitors (anesthesiologists) to block another set of competitors (nurse anesthetists) out of the market for anesthesiology services thereby driving up the prices for those services and depriving consumers of the services they preferred (the nurse anesthetist services). This conduct occurred solely for the purpose of allowing the anesthesiologists to gain a greater share of the market so as to increase their own incomes while eliminating competitors (nurse anesthetists) from the market.

Oltz is not analogous to the present case. There was no evidence in the present case of an agreement or conspiracy between the respondents. Further, there was no evidence in the present case that surgical services were diverted to respondent physicians thereby adversely affecting either the price or availability of these surgical services in the market. Indeed, the illogic of such a position is apparent. Dr. Schueller was the only board certified surgeon in the market. How could the respondent physicians have diverted surgical services to themselves

when they were not surgeons who could provide those services?[2] Additionally, why would the respondent hospital conspire to reduce surgical services in the market when such conduct would be to the hospital's own detriment?

Neither the district court nor the Eighth Circuit applied any novel theory of antitrust law to the facts of this case. Both courts simply recognized that Dr. Schueller failed to present evidence that would have established any anti-competitive behavior on the part of respondents that detrimentally affected competition. This case represents no more than an antitrust case in which the plaintiff failed to present sufficient factual issues to overcome the defendants' motion for summary judgment.

Even if the first question raised by Dr. Schueller warranted review by this Court, the issue as it relates to Dr. Schueller's § 1 claim would be moot because the district court had an additional reason for denying that claim. The district court held that the § 1 claim related to conduct that occurred during professional peer review proceedings and, therefore, was barred by the intracorporate immunity doctrine set forth in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The district court explained that proof of concerted action was required under a § 1 claim. Under the facts in this case,

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[2] Respondent Birriel is a non-board certified surgeon who did not join the medical staff of the respondent hospital until 1989. Dr. Schueller did not present evidence to the district court which would have established that Dr. Birriel engaged in anti-competitive behavior to gain a larger share of the market for surgical services.

the medical staff, composed of the respondent physicians, acted as an integral part of the hospital's peer review proceedings. Therefore, for purposes of a § 1 claim, the hospital and the medical staff were not separate entities capable of concerted action which would detrimentally affect competition. *See* Pet. App. E, 43a-44a. Dr. Schueller does not seek review of this issue.

III.

AN ALLEGED ERROR BY THE DISTRICT COURT IN CHARACTERIZING THE NATURE OF THE CLAIMS DOES NOT JUSTIFY REVIEW BY THIS COURT.

Although respondents have difficulty determining the point Dr. Schueller seeks to raise in the second question presented for review, the question seems to be premised on the erroneous assumption that the district court ignored Dr. Schueller's § 1 claim as it related to allegedly unlawful conduct of respondents occurring outside the peer review process. Once again, Dr. Schueller has mischaracterized the district court's decision. The district court specifically considered this contention by Dr. Schueller and stated:

> First, the court finds plaintiff's argument that his action is not based upon the professional peer review conducted by members of the Ashley Memorial staff to be completely without merit. Examination of plaintiff's complaint immediately reveals that plaintiff is challenging not only the peer review process and proceedings but also the final decision of the Board of Governors to revoke his clinical privileges at Ashley Memorial, characterizing each as illustrative of antitrust violations. This conclusion is

> supported by plaintiff's repeated references to the "peer review" proceedings as well as the suspension and termination of his medical privileges; this includes but is not limited to, references in paragraphs 18, 19, 37, 38, 39, 40, 42, 43, 44, 47, 52, 53, 54, 55 and 57 of his complaint.

Pet. App. E, 23a-24a.

A review of Dr. Schueller's complaint, attached in its entirety to this response to the petition as Appendix A, reveals that the district court properly characterized the nature of Dr. Schueller's complaint as an antitrust action based upon conduct occurring in the context of peer review proceedings.

Even if the district court erred in its characterization of Dr. Schueller's complaint, what difference would that make to the outcome of this case? At best, it would mean that respondents would not be entitled to the immunity afforded under the Health Care Quality Improvement Act because, as Dr. Schueller contends in the petition, their actions were allegedly not taken "in the reasonable belief that the action was in the furtherance of quality health care." *See* 42 U.S.C. § 11112(a)(1). As the district court recognized, Dr. Schueller would still be required to present sufficient evidence under his § 1 claim of (1) a contract, combination, or conspiracy which results in (2) an unreasonable restraint of trade. *See Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915, 930 (E.D. Mo. 1990), *aff'd*, 935 F.2d 990 (8th Cir. 1991). He did not do so. Therefore, the court granted the motion for summary judgment.

Dr. Schueller essentially contends that the lower courts failed to consider what effect allegedly unlawful

conduct of respondents outside the peer review proceedings had on his § 1 claim. Dr. Schueller maintains that such conduct establishes that the peer review proceedings were not instituted due to his lack of professional competency or conduct. As respondents argued in their brief before the Eighth Circuit, such an argument was never presented to the lower court. Dr. Schueller challenged validity of the peer review proceedings only on the ground of the adequacy of the notice and hearing procedures required by 42 U.S.C. § 11112(a)(3). This Court should not consider an issue which was not properly raised before the lower court. *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *Canton v. Harris*, 489 U.S. 378, 385 (1989).

IV.

THE DISTRICT COURT'S FACT INTENSIVE REVIEW OF THE PEER REVIEW PROCEEDINGS DOES NOT WARRANT REVIEW BY THIS COURT.

Dr. Schueller has not presented any issue related to the Health Care Quality Improvement Act which would warrant review by this Court. The third question presented by Dr. Schueller relates to whether the lower courts erred in finding as a matter of law that Dr. Schueller was afforded adequate notice and hearing procedures pursuant to 42 U.S.C. § 11112(a)(3), such that respondents would be entitled to immunity from damages under the Health Care Quality Improvement Act. Dr. Schueller asks this Court to declare that under the Health Care Quality Improvement Act, the minimum due process that should be afforded would require notice of the charges, the right

to representation by counsel at a hearing, and the right to confront witnesses offering evidence against the physician involved.

Once again, Dr. Schueller raises issues that were not properly presented to the lower court. Dr. Schueller did not challenge below adequacy of the notice and hearing procedures afforded on the basis of lack of representation by counsel or lack of notice of the charges against him. Only the issue of his right to confront Dr. Garcia (who did not even testify at any hearing) was raised below. As stated above, this Court should decline review of an issue relating to matters not properly raised before the district court.

Further, Dr. Schueller's representation to this Court that the district court found that he received adequate notice and a hearing based upon an August 28 hearing is a misinterpretation of the conclusion reached by the district court. The district court concluded, after a thoughtful review of the full scope of the peer review proceedings against Dr. Schueller, which included more than one hearing, that the notice and hearing procedures afforded Dr. Schueller were "fair under the circumstances." Pet. App. E, 31a. It was not necessary for the district court to separately analyze every action taken in the course of the peer review proceedings against Dr. Schueller and determine whether it met the standards set forth in 42 U.S.C. § 11112. It is sufficient that the substantial part of the peer review proceedings instituted against Dr. Schueller met the standards set forth in § 11112. *See Fobbs v. Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054, 1065 (E.D. Cal. 1993), *aff'd in part and rev'd in part on other grounds*, 29 F.3d 1439 (9th Cir. 1994), *cert. denied*, 115 S. Ct.

936 (1995); *Smith v. Ricks*, 31 F.3d 1478 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1400 (1995).

To the extent that Dr. Schueller contends that he was deprived of minimal due process rights under the Health Care Quality Improvement Act, that issue was also not properly preserved before the Eighth Circuit. Respondents moved for summary judgment on this issue on the ground that the Health Care Quality Improvement Act did not provide a private right of action to Dr. Schueller. Rather, the act was only enacted to afford immunity to physicians participating in the peer review process if certain standards were met. The district court agreed that no private right of action exists under the act. Dr. Schueller did not appeal this ruling of the district court to the Eighth Circuit.

Even if the issue had been raised before the district court, the district court's ruling was consistent with decisions from other jurisdictions which have considered it. *See Hancock v. Blue Cross-Blue Shield of Kan., Inc.*, 21 F.3d 373, 374 (10th Cir. 1994) (no implied cause of action exists under the Health Care Quality Improvement Act); *Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187, 188-89 (S.D. Ohio 1991) (the Health Care Quality Improvement Act does not grant a physician a private right of action for deprivation of due process rights).

The district court appropriately engaged in a fact intensive review of peer review proceedings to determine whether there was any genuine issue of material fact for the jury's consideration. *See Austin v. McNamara*, 731 F. Supp. 934 (E.D. Cal. 1990), *aff'd*, 979 F.2d 728 (9th Cir. 1992). The conclusions reached by the district court and

the Eighth Circuit Court of Appeals that respondents were entitled to immunity under the act has no application beyond the facts of this particular case. Further, there is no issue presented related to the Eighth Circuit's interpretation of the Health Care Quality Improvement Act that represents a conflict among the circuit courts or that represents a conflict with a previous decision of this Court.

CONCLUSION

This case represents no more than one in which a disgruntled physician is attempting to regain his privileges at a hospital under the guise of an antitrust lawsuit against the hospital and its medical staff. There are no questions presented of any significance that would warrant review by this Court. Accordingly, for the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COMPLAINT OF PETITIONER
FILED IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
ON JUNE 16, 1992

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

NO.: 92-1075

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR.,
WILLIAM S. ARNOLD, NED HASTINGS,
and ROOSEVELT EARLY, TRUSTEES OF
CROSSETT HEALTH FOUNDATION;
ASHLEY MEMORIAL HOSPITAL;
DR. T. BIRRIEL, M.D.; DR. F.N. BURT, M.D;
DR. E.A. GRESHAM, M.D.; DR. L.F. GARCIA, M.D.;
DR. J.D. RANKIN, M.D.; DR. C.E. RIPLEY, M.D.;
DR. D. L. TOON, M.D.; DR. B.J. WALSH, M.D.;
JOHN DOE #1; and JOHN DOE #2

DEFENDANTS

COMPLAINT

The Plaintiff, Dr. Steven C. Schueller, M.D., by and through his attorneys, WELCH, MATHIS & ADCOCK, for his Complaint, states and alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1331 and 1337(a). This action is based

upon alleged violations of the Sherman Anti-Trust Act (15 U.S.C. Section 1, *et seq.*).

Venue lies under 28 U.S.C. Section 1391(b); and all Defendants either reside in and/or transact substantial amounts of business and commerce in Ashley County in the State of Arkansas, all within the Western District of Arkansas.

PARTIES

3. Dr. Steven C. Schueller, M.D. ("Schueller") is a duly licensed physician by the State of Arkansas, and a Board Certified Fellow of the American College of Surgeons.

4. Crossett Health Foundation ("CHF") is an unincorporated association or non-profit corporation which owns and operates Ashley Memorial Hospital ("AMH").

5. Ashley Memorial Hospital ("AMH") is a non-profit, private corporation providing health care and related services in Crossett, Arkansas.

6. Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, and Roosevelt Early are individuals acting as the trustees of CHF.

7. Defendants Dr. T. Birriel, M.D., Dr. F. N. Burt, M.D., Dr. E. A. Gresham, M.D., Dr. L. F. Garcia, M.D., Dr. J. D. Rankin, M.D., Dr. C. E. Ripley, M.D., Dr. D. L. Toon, M.D., and Dr. B. J. Walsh, M.D. are individual physicians who reside in, and engage in the practice of medicine, in Crossett, Arkansas, performing various medical services according to training, credentials, and specializations.

8. Defendant(s) John Doe are unknown individuals, corporations, partnerships or associations who, in concert with the named defendants, participated in, encouraged, organized or otherwise engaged in the illegal activities alleged herein. The names of these Defendants are best known to the Defendants and are outside the present scope of Schueller's knowledge, though Schueller has reason to believe in the existence of these individuals, partnerships, corporations or associations.

GENERAL

9. Schueller has practiced medicine and surgery at AMH at all times material and relevant hereto.

10. Schueller was recruited and induced to move from Iowa to Crossett in 1983 for the purpose of establishing a medical and surgical practice in Crossett.

11. CHF acts through the three individual trustees named herein as defendants.

12. AMH is governed by a Board of Governors, consisting of seven (7) to fifteen (15) individuals, all of whom are appointed by the Trustees of CHF.

13. Control of the practice of medicine at AMH was delegated to a self-governing body known as the AMH Active Medical Staff (the "Active Medical Staff") between 1982 and the present date.

14. Control of the practice of medicine by the Active Medical Staff was one of the requirements which AMH had to satisfy to receive accreditation from the Joint Commission of Accreditation of Hospitals.

15. Generally, the Active Medical Staff (or some committee thereof) was responsible for all phases of AMH medical policy, including, but not limited to, extending AMH "privileges" to physicians; "credentialing" physicians; and recommending disciplinary action against physicians, subject to approval by the AMH Board of Governors.

16. Physician "privileges" denote that a particular physician has been authorized to admit patients to a particular hospital; and to avail himself of the medical, technical and other support services offered by that hospital for the purpose of providing patient treatment.

17. Physician "credentials" denote the particular medical procedures that the physician is authorized to perform at a hospital at which the physician may hold "privileges."

18. Professional competency or professional conduct of an individual physician at a health care institution, such as AMH, is controlled through a procedure known as "professional review" or "peer review."

19. Generally, "peer review" determines whether the physician may have "privileges" at a health care facility, such as AMH; the scope and conditions of such "privileges" (i.e., the "credentials"); and changes or modifications to the physician's "privileges" (including revocation and dismissal).

20. The medical doctors named herein as defendants individually (together with Schueller and others not named as Defendants) comprised the AMH Active Medical Staff between 1985 and December 16, 1991, with

the exception of Dr. Tomas Birriel, M.D., who became a member of the AMH Medical Staff in 1989.

21. Each medical doctor, who was a member of the AMH Medical Staff (including Schueller and others who were not named as defendants) has an independent, private medical practice; and each medical doctor's private medical practice is, unless lawfully joined with another medical doctor in a partnership or as a shareholder in a professional association, potentially in competition with all other medical doctors who were members of the AMH Active Medical Staff. Those who have lawfully joined together in a partnership or as a shareholder in a professional association are potentially in competition, through ownership of that partnership or professional association, with all other medical doctors who were members of the AMH Active Medical Staff.

22. Members of the Active Medical Staff (including Schueller and others who were not named as defendants) marketed their medical services to the general public separately and independently of each other, unless lawfully joined in a partnership or as members of the same professional association; and if so joined, marketed their medical services to the general public through such organization, separately and independently of each other.

23. Members of the Active Medical Staff (including Schueller and others not named as defendants) also marketed their medical services to the general public separately and independently of the medical services offered to the general public by AMH; and Active Medical Staff members (including Schueller and the others not named as defendants) billed for the medical services which they

rendered to patients admitted to AMH separately and apart from the medical services which AMH charged to patients admitted to AMH by physicians holding "privileges" at AMH.

24. Between 1982 and the present date, AMH engaged an individual as its employee who held the managerial position at AMH as "hospital administrator." The hospital administrator, who reported to the AMH Board of Governors, was responsible for overseeing and managing the day-to-day operations of AMH.

TRADE AND COMMERCE

25. The medical practices of Schueller, AMH and the defendant physicians who are members of the AMH Active Medical Staff have more than an insubstantial effect upon interstate trade and commerce. Schueller and the defendant physicians who are members of the AMH Active Medical Staff routinely and customarily render medical services to patients who are not residents of the State of Arkansas. AMH routinely and customarily admits patients who are not residents of the State of Arkansas, some or all of whom are referred by the members of the AMH Active Medical Staff.

26. Schueller, AMH, and the physicians who are members of the AMH Active Medical Staff routinely and customarily receive reimbursement for their medical services rendered from insurers (including Medicare and Medicaid) which are not residents of the State of Arkansas, as well as directly from the non-resident patients themselves.

RELEVANT MARKET

27. Schueller is a Fellow of the American College of Surgeons, holding this distinction continuously throughout the time between 1983, when he arrived in Crossett, through the present date. As such, Schueller is "board certified" in the medical field of surgery. Certain other member [sic] of the AMH Active Medical Staff held "board certification" in the medical field known as "family practice" during this same time period; but no other physician was certified in the field of surgery. All other members of the AMH Active Medical Staff engaged primarily in the practice of delivering "primary care" (i.e., the general practice of medicine commonly known as "family practice").

28. Schueller's sole source of obtaining surgical patients was referrals from other physicians within the Crossett medical community, including the members of the AMH Active Medical Staff.

29. Schueller found it necessary to refrain from engaging in the general or "family practice" of medicine in order to obtain and retain the goodwill of the other physicians in the Crossett medical community, thereby securing a steady stream of potential surgery referrals.

30. Schueller and the Members of the AMH Active Medical Staff enjoyed admitting and treating "privileges" at AMH between 1983 and December 16, 1991. Schueller practiced surgical medicine solely and only at AMH during this period of time.

31. AMH is a fifty-eight (58) bed facility serving residents of Arkansas, Mississippi, and Louisiana. AMH

is a basic or general care facility emphasizing "primary care," (i.e. the point when a patient first seeks assistance from the medical care system and the treatment and care of common and recurring illnesses).

32. AMH services a circular geographic area within a twenty-five (25) mile radius of Crossett, Arkansas. No other hospitals are located within this radius of Crossett. AMH's competition for patient admissions and the delivery of medical services is hospitals located in Bastrop and Monroe, Louisiana and Lake Village, Monticello and El Dorado, Arkansas.

VIOLATIONS ALLEGED

COUNT 1. SCHUELLER V. ALL DEFENDANTS – SHERMAN ACT SECTION 1, HORIZONTAL CONSPIRACY – COLLECTIVE BOYCOTT

33. Schueller restates, realleges and incorporates the provisions of paragraphs 1 through 32, inclusive herein, as if fully set out word for word.

34. Beginning on a date best known to AMH and the defendant doctors who are members of the Active Medical Staff, but continuing during the five year period immediately preceding December 16, 1991, AMH and the Defendant doctors who are members of the Active Medical Staff, and each of them, together with other known and unknown individuals, firms, corporations, associations, partnerships, and/or joint ventures, have engaged in a continuing contract, combination, conspiracy and/or concert of action to unreasonably restrain interstate trade and commerce in the area served by AMH.

35. As part of such unlawful conduct, AMH and each of the defendants who are members of the Active Medical Staff, have engaged in, or have aided and abetted, a collective boycott of Schueller in a successful attempt to deny the consumers of surgical services in the geographic area served by AMH (a) the full range of surgical services which a "board certifed" surgeon could offer at AMH; (b) the right to select the physician of their choice to render surgical services to them at AMH; and (c) the right to purchase a broader range of surgical services from AMH than is otherwise available from a surgeon who is less skilled, less qualified, and less experienced than Schueller.

36. The contract, combination and conspiracy, consists of a continuous understanding, agreement, and/or concert of action among the trustees of CHF, the members of the AMH board of governors, employees and agents of AMH, and the defendant physicians who are members of the AMH Active Medical Staff the substantial purpose of which was to boycott and refuse to deal with Schueller, thereby (a) effectively prohibiting Schueller from performing surgical services at AMH, an essential facility for that purpose; (b) denying patients at AMH the right to select Schueller as the physician of their choice from whom to purchase surgical services at AMH; and (c) substantially reducing the range of surgical services available to consumers of surgical services at AMH.

37. The common purpose to collectively boycott Schueller was initiated, implemented, and effectuated by the CHF trustees, the AMH Board of Governors,

employees and agents of AMH, and the defendant physicians who are members of the Active Medical Staff, all of whom engaged in one or more of the following activities:

(a) Initiating unfounded and baseless challenges to Schueller's "credentials" to perform certain surgical procedures which were advanced by the AMH hospital administrator.

(b) Initiation of "peer review" actions, involving attempts by the AMH hospital administrator to secure "peer review" of Schueller's surgical cases by the AMH Active Medical Staff, by outside consultants, and third party "peer review" organizations.

(c) Seeking to initiate disciplinary proceedings against Schueller, alleging the improper prescription of narcotics for a patient suffering pain, based upon the charges of the hospital administrator.

(d) Blocking Schueller's succession to the post Chief of the AMH Active Medical Staff, a post which would have elevated Schueller to the AMH Board of Governors, because of Schueller's disagreements with the AMH Board of Governors over AMH policy and questions raised regarding the conduct of AMH financial affairs in transactions in which self-dealing and improper financial inurement of the AMH Board of Governors and their affiliates was involved.

(e) Threatening Schueller with summary dismissal from the AMH staff and loss of AMH "privileges" because of Schueller's public disagreement with AMH

Board of Governor's policies relating to hospital management and policy and the conduct of AMH financial affairs.

(f) Summarily suspending Schueller in December 1991 from all AMH "privileges" following an alleged "peer review" proceeding conducted by members of the AMH Active Medical Staff who are defendants herein, the basis of which was Schueller's alleged "disruptive behavior," and which was totally unrelated to Schueller's professional competency or conduct.

38. The 1991 alleged "peer review" action, which resulted in Schueller's loss of "privileges" at AMH, was initiated by the AMH Board of Governors; and was conducted by members of the AMH Active Medical Staff who are defendants herein and who were actual or potential competitors of Schueller for the delivery of medical services at AMH.

39. The 1991 "peer review" action, which resulted in Schueller's loss of "privileges" at AMH, was not undertaken by the AMH Board of Governors or the members of the AMH Active Medical Staff who are defendants herein (i) in the reasonable belief that the action furthered the quality of health care at AMH; (ii) after a reasonable effort was made to obtain all facts; (iii) after adequate notice and hearing procedures were established to safeguard Schueller's rights; or (iv) in the reasonable belief that the "peer review" action was warranted by the facts known, after first undertaking a reasonable investigation to obtain all facts and providing procedural safeguards and adequate notice to Schueller.

40. Moreover, the outcome of the 1991 "peer review" action which resulted in the revocation of Schueller's "privileges" at AMH was not reported to the Arkansas State Medical Board within a period of one (1) month, as required by law.

COUNT II. SCHUELLER V. ALL INDIVIDUAL DEFENDANT MEMBERS OF ACTIVE AMH MEDICAL STAFF – SHERMAN ACT SECTION 2 – COLLECTIVE REFUSAL TO DEAL – ESSENTIAL FACILITY

41. Schueller restates, realleges and incorporates the provisions of paragraphs 1 through 40, inclusive herein as if fully set out word for word.

42. The defendant physicians who are members of the AMH Active Medical Staff constitute a majority of the members of that body during the relevant period of time in this case.

43. As a majority of that body, the defendant physicians who are members of the AMH Active Medical Staff controlled the identity of physicians who received "privileges" at AMH; the scope of a physician's "credentials" at AMH; and other "peer review" activity relating to the physicians patents [sic] admitted to AMH.

44. "Privileges" at AMH are essential to a surgeon, situated like Schueller, substantially all of whose practice of medicine transpires within the confines of a hospital, like AMH. Moreover, admitting "privileges" at AMH confers a substantial economic and competitive advantage upon physicians over other physicians with whom they compete for the delivery of medical services, and who do

not have admitting "privileges" at AMH. It is impracticable for any physician, including Schueller, to compete within the relevant geographical market for the delivery of medical services without holding "privileges" at AMH.

45. No other hospital is located within the geographic market served by AMH; and as a result, AMH accounts for virtually one hundred percent (100%) of the available hospital beds and facilities within this area. Further, the capital costs of constructing and equipping, and the licensing and regulatory procedure associated with, constructing a competing hospital in the relevant geographic market served by AMH render an alternative facility a virtual impossibility. Moreover, AMH had an occupancy rate of approximately twenty-eight [sic] percent (29%) during its 1990 fiscal year, thereby further reducing the prospect that appropriate regulatory agencies would issue a "certificate of need."

46. Defendant physicians who are members of the AMH Active Medical Staff accounted for more than a majority of the admissions to AMH during the relevant time period.

47. The acts alleged herein excluded Schueller from the practice of medicine at AMH, denying him access to this essential facility, and denying the consumers of medical services at AMH the broader range of medical services which Schueller could deliver. The pattern of exclusion extended over a period of years, and is demonstrated by the annual reductions in Schueller's gross income, shown as follows:

YEAR	GROSS INCOME FROM MEDICAL PRACTICE
1985	$117,061
1986	89,458
1987	84,234
1988	48,304
1989	47,848
1990	29,107

48. The defendant physicians who are members of the AMH Active Medical Staff intended to create, and have in fact created, and intended to maintain, and have in fact maintained, monopoly power over the practice of medicine at AMH.

COUNT III. SCHUELLER V. ALL INDIVIDUAL DEFENDANT MEMBERS OF ACTIVE AMH MEDICAL STAFF - SHERMAN ACT SECTION 2 - COLLECTIVE REFUSAL TO DEAL - ESSENTIAL FACILITY

49. Schueller restates, realleges and incorporates the provisions of paragraphs 1 through 48, inclusive herein as if fully set out word for word.

50. The defendant physicians who are members of the AMH Active Medical Staff have engaged in a continuing contract, combination, conspiracy and concert of action among themselves, and with others, the purpose of which is to create and maintain monopoly power over the practice of medicine at AMH.

COUNT IV. SCHUELLER V. AMH – SUSPENSION OF PRIVILEGES – VIOLATION OF HEALTH CARE QUALITY IMPROVEMENT ACT – DENIAL OF DUE PROCESS

51. Schueller restates, realleges and incorporates the allegations of paragraphs 1 through 50, herein as if fully set out word for word.

52. On May 14, 1991, Schueller directed a letter to the Joint Commission on Accreditation of Health Care Organizations, voicing his concerns about the standard of health care and financial management at AMH. This action was the last in a long series of other actions which Schueller undertook questioning these areas at AMH and which spanned at least a period of five years. Approximately four weeks thereafter, the AMH Board of Governors, upon learning of Schueller's action, instructed the AMH Active Medical Staff to admonish Schueller to refrain from such activity as well as other unspecified "disruptive" behavior.

53. On August 6, 1991, a "special" meeting of the AMH Active Medical Staff was convened to consider the permanent revocation of Schueller's "privileges" at AMH. Schueller was given no notice of this meeting and afforded no opportunity to challenge or controvert any allegations made against him at this meeting, in direct violation of the AMH by-laws governing its Active Medical Staff. The meeting resulted in the recommendation that Schueller's "privileges" at AMH be terminated. A special "ad hoc" committee consisting of the same individuals from the AMH Active Medical Staff who had

made such recommendation, was appointed to allow Schueller to challenge this recommendation.

54. The "ad hoc" committee met in September 1991, more than one month after Schueller had been summarily suspended, at which Schueller was directed to defend himself against charges of "disruptive behavior." The charges leveled against Schueller were totally unrelated to Schueller's professional conduct or the quality of medical care he provided to his patients.

55. No witness testified at the September 1991 hearing and no evidence was produced against Schueller relating to the allege [sic] charges. At the conclusion of the hearing, the "ad hoc" committee adopted the recommendations of the AMH Active Medical Staff from its "special" meeting in August 1991 and voted to revoke Schueller's "privileges" at AMH.

56. The AMH Board of Governors approved the recommendation of the "ad hoc" committee at a meeting in November 1991. Again, no witness testified, and no evidence in support of the charges leveled against Schueller was produced.

EFFECT OF UNLAWFUL ACTS

57. The adverse effects upon competition and the damage suffered by Schueller from the combinations, conspiracies, concerts of action, and monopolistic practices described herein are as follows:

(a) Consumers of medical services in the geographic area served by AMH have been denied the surgeon of their choice at AMH;

(b) Consumers of medical services in the geographic area served by AMH have been forced to either (i) accept a substandard level of surgical care at AMH; or (ii) incur additional and unnecessary expense to locate and employ the services of a surgeon possessing similar skill and qualification in other locations.

(c) Schueller has experienced the loss of income in the form of reduced medical fees, insurance reimbursements, and income from other related sources, all in amounts which he is unable to specify with any reasonable accuracy at this time.

(d) The value of Schueller's medical practice has been completely and totally destroyed, the value of which is unknown at this time.

(e) The unlawful suspension of Schueller's "privileges" at AMH preclude Schueller from obtaining hospital "privileges" at any other hospital in the United States, thereby effectively depriving Schueller of the right or ability to practice surgical medicine.

(f) That for the limited purposes set forth, *infra*, and in the attached Request for Reinstatement by Preliminary Injunction and Temporary Restraining Order, the Plaintiff has no complete and adequate remedy at law with which to mitigate his suspension and said suspension causes Plaintiff irreparable harm.

REQUESTED RELIEF

58. Schueller requests this Court grant him a preliminary and permanent injunction enjoining the defendants from further actions as alleged herein, and to

mandate the reinstatement of his rights and privileges at AMH to a level not less than before the alleged conduct, concert of action, and conspiracy alleged herein.

WHEREFORE, Schueller prays that this Court award him the amount of damages determined to be suffered, enter joint and several judgments against all Defendants, and each of them, award him reasonable attorney's fees and costs incurred in this action, grant a temporary and permanent injunction under the terms requested above; and for all other just and proper relief in the premises.

PLAINTIFF DEMANDS A JURY TRIAL.

Respectfully submitted,

/s/ Morgan Welch
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